Nos. 226, 227, 243, 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

THOMAS W. STREETER ET AL., PETITIONERS,

v.

SAME

HOME INSURANCE COMPANY ET AL., PETITIONER,

v.

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CENTRAL-ILLINOIS SECURITIES CORPORATION, and CHRISTIAN A. JOHNSON, PETITIONERS,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER ET AL., HOME INSURANCE COMPANY ET AL.

BRIEF FOR LUCILLE WHITE AND FRANCES BOEHM, COMMON STOCKHOLDERS

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Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for

rehearings (R. 138) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinions of the Securities and Exchange Commission dated December 4, 1946 and January 8, 1947, have not yet been officially reported, but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Statute Involved

The provisions of Section 11(e) of the Act, the statutory provision directly applicable here, are set forth in Appendix A, *infra*, pp. 65-71, together with the pertinent provisions of other sections of the Act referred to in this brief.

Statement

Lucille White and Frances Boehm own 1000 shares of common stock of Engineers. They have owned this stock for years.

Prior to the adoption of the Public Utility Holding Company Act of 1935, Engineers owned and controlled approximately seventeen electric, gas and transportation companies operating throughout the United States. The Securities and Exchange Commission ordered Engineers to dispose of all its properties except the common stock of one subsidiary, Virginia Electric and Power Company.

Engineers filed a plan under Section 11(e) of the Act proposing the complete and final liquidation of Engineers and the entire holding company system. In its opinion with respect to the plan, the Commission made the following formal finding:

> "We find that the presence of Engineers would unduly complicate the structure of the system and

that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act."[1]

Notwithstanding this square finding that the liquidation was compelled by the Statute, the Commission required the plan to be amended to provide for payment to the preferred holders of the full amount to which they would have been entitled under the Charter on a *voluntary* redemption or *voluntary* liquidation.[2] The Commission reasoned that the Charter provisions should be disregarded, and that the preferred holders must be paid the theoretical "investment value", which in practical effect was the price at which their stock might sell on the market on a particular date (which happened to be at about the top of the bull market of 1946), "ex the impact of the Act", or as though the company were not required to liquidate or dissolve.

The Commission in its opinion referred to the "value" of the preferred stock computed on the foregoing basis as the "investment value" or "fair investment value", terms which are quite misleading. The Commission then went on to say that this "investment value"[3] was not challenged, and that it was in fact "conceded" by the witnesses for the company.[4] Appellants in their briefs in this Court and in the Courts below have similarly reit-

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[1] R. 48a. Chairman Caffrey, in his separate concurring opinion stated: "Engineers 'voluntary' proposal did no more than forestall the necessity for action by the Commission. * * * It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation" (R. 139a, 140a).

[2] That is, $105 per share plus accrued dividends for the $5 series, and $110 per share for the $5.50 and $6.00 series. These amounts aggregate $3,200,000 in excess of the $100 per share to which the preferred stockholders were entitled in liquidation (whether whole or partial) which is not "voluntary" (See Charter, R. 1412a).

[3] Commission Opinion, R. 67a.

[4] *Ibid.*

erated time and again that the values accepted by the Commission were "uncontroverted". Such statements draw a heavy veil over large and significant portions of the evidence contained in the record. The company witnesses did indeed agree that *in the boom market then current*, the preferred stocks of Engineers would probably have sold close to their redemption prices *if the company were not required by Section 11 to complete its liquidation and to dissolve.*

Under such circumstances, these witnesses asserted, Engineers would take advantage of the extraordinarily low money rates then prevailing to call and redeem the preferred stocks, replacing them with others carrying a much lower interest rate, with substantial resulting benefit to the common stockholders. But the forced liquidation of Engineers rendered such action impossible. Moreover, they testified, on the basis of intrinsic investment qualities the Engineers preferred stocks could by no means be said to have a "fair value" equal to the redemption prices because they were essentially speculative securities which would decline sharply as soon as current "boom" economic conditions fell off. In substantiation of these views, the witnesses pointed to the past market history of these preferred stocks, and they discussed in considerable detail potential adverse economic factors which cast a dark cloud over the future of the stocks if they remained outstanding for any substantial length of time.[1]

No indication of this extensive testimony and evidence is even suggested by the Commission in its Opinion or by appellants in their briefs.

When the plan was presented to the District Court for enforcement, the objecting common stockholders contended that on the basis of the foregoing factors, as well as on the basis of applicable legal principles, the Commission was not justified in requiring the common stockholders to pay

[1] R. 522a-525a.

to the preferred any amounts in excess of $100 per share plus accrued dividends. The legal questions before the District Court were three: (1) whether the Charter liquidation provisions limiting the preferred holders to $100 per share plus dividends in the event of a liquidation "not voluntary" could be overridden; (2) whether, even if the Charter liquidation provisions were not controlling, the long line of consistent decisions holding amounts in excess of par value not payable on senior securities retired under the impact of the Statute, could now be reversed or "distinguished" away; (3) whether, in any event, the theoretical market value at which such senior securities might sell at a particular time, was the sole and conclusive criterion to be employed in measuring the claims of the senior security holders, with the junior equity holders simply taking whatever happened to remain.

The District Court chose not to pass upon the question whether the Charter provisions as to redemption of the preferred stock were controlling. However, it concluded that even if the Charter liquidation provisions were not controlling, the preferred holders were not entitled to receive amounts in excess of $100 per share, plus dividends, on the basis of the same legal and equitable principles which had consistently led the courts for years to deny such additional payments on senior securities retired pursuant to the statutory mandate. In those cases too it had been contended by the affected security holders that if they were not entitled to "premiums" as such, they should receive amounts "measured by the premiums" to compensate them for relinquishing securities bearing a dividend or interest rate in excess of the current "going rate", but the Commission and the Courts had consistently rejected such contentions on the ground that the retirement was dictated by an Act of Congress over which the company and its stockholders had no control.

The District Court found no legal support for the view that the price at which the senior securities would sell,

"as though the enterprise continued", must be accepted as the controlling criterion; and it found that adoption of such a standard would be neither realistic nor equitable in its application to the final and complete liquidation of the enterprise which was here taking place.[1] However, the Court envisaged that there might be cases in which valid equitable considerations would justify payment to preferred stockholders of amounts in excess of the par value of their securities. The District Court, as a court of equity, therefore carefully examined the record to ascertain whether any such factors were present, and concluded:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable considerations warranting the payment to the preferred holders of amounts in excess of $100 per share plus accrued dividends; and careful examination of all the relevant facts impels the conclusions that payment to the preferred stockholders of such excess amounts would not be warranted or justified."[2]

The Court of Appeals held that the District Court had the independent duty of passing on the fairness of the plan, that the *Otis* case did not apply to the dissolution of Engineers for the reason that in the *Otis* case there was merely a simplification of a holding company system and not a dissolution of the enterprise, and that the "investment value ex the Act" formula of the Commission was not the proper method of valuing the rights of the preferred stock, and that the Commission had failed to give any consideration to the rights of the common stock, which the Holding Company Act required. The Court of Appeals

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[1] Conclusions of Law 3-8, R. 316a-317a.

[2] Conclusions of Law No. 7, R. 316a-317a. Cf. also Opinion, R. 292a.

held that upon the record before the Commission and the District Court the payment of call premiums to the preferred stock was unfair and inequitable. However, it directed that the case be remanded to the Commission on the ground that the question of valuation of the securities of Engineers preferred and common stocks must be made by the Commission.

Questions Presented

1. In connection with the final liquidation of a holding company compelled by the Public Utility Holding Company Act, was the District Court, under Section 11(e) of the Act, required to approve as "fair and equitable" mandatory payment by the common stockholders to the preferred stockholders of $3,200,000 in excess of the latter's charter and book claim, on the ground that the theoretical market value of the preferred stocks on a particular date, "absent the Holding Company Act", was the correct and sole criterion for measuring the claims of such stockholders?

2. Whether the District Court was authorized under Section 11(e) of the Act to determine, and properly determined in this case, not only that the Securities and Exchange Commission erred in measuring the "equitable equivalents" which the preferred stockholders claim to be entitled to receive in exchange for the rights they surrendered, but that on any possible proper measure of those "equitable equivalents" on this record, $100 per share is the maximum to which the preferred stockholders are entitled?

3. If the answer to question 2 is in the affirmative, was it necessary to remand the case to the Commission, when the Commission had already approved the payment of $100 per share to the preferred stockholders in the event that the courts determined that payment of more than that amount would not be fair and equitable?

4. Does Section 11(e) of the Holding Company Act authorize valid Charter provisions to be overridden and cast aside, when such action is not reasonably necessary to carry out the basic objectives of the statute?

5. If an affirmative answer be given to question 3 above, does such a result violate constitutionally protected rights?

Summary of Argument

A Section 11(e) Court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Commission, is fair and equitable. This principle, which has been consistently espoused by the Commission and the courts, was approved by the Circuit Court after a thorough analysis of the history of the Act. There is no actual conflict in the Circuits with respect to this principle, and no hardship will flow from the practical application of this sound and necessary doctrine.

Under Section 3 of Engineers charter, the preferred stock is entitled to $100 per share in any situation in which it is paid out upon the involuntary termination of the enterprise. Here the termination was compelled by the Public Utility Holding Company Act and the order of the Securities and Exchange Commission, and not by voluntary action of the company. The Commission has so held. The Plan is not a mere corporate simplification as the Plan was in the *Otis* case, but constitutes a complete liquidation and dissolution of Engineers. Under those circumstances, the charter is controlling. It provides without qualification that "in the event of liquidation, dissolution or winding up of this corporation, or reduction of its capital stock, resulting in any distribution of its assets to its stockholders" the preferred stock shall receive $100 per share, but that if such action is voluntary it shall receive the fixed redemption premium provided by the

charter. This provision constitutes a contract between the company and the stockholders. It may not be overridden.

Though Engineers' charter was adopted some years before the passage of the Holding Company Act agitation was already then going on for the dissolution of large public utility holding company systems on the ground that they were inimical to the public interest. It may therefore be fairly said that the possibility of such legislation being enacted was already within the contemplation of the parties. Certainly the broad and sweeping language of the charter was sufficiently comprehensive to include dissolution from any cause whatsoever. The framers of the charter intended to and did cover *all* situations in which the preferred stock might be paid out upon the termination of the enterprise, no matter how such termination may be brought about, including governmental frustration. The charter is unambiguous and covers every possible situation which might bring about the termination of the enterprise. It may not therefore be said that termination by governmental frustration was not intended to be covered by the charter.

Even should it be held that the charter provision may be overridden, we contend that the fair and equitable standard of Section 11(e) of the Holding Company Act does not require or justify the payment of more than $100 per share to the preferred stock. The past market history of the preferred stock; the slim coverage of dividends and fixed charges over a period of many years; the fact that for three years its dividends were in default, that its average market price during the entire period that it was outstanding was about $64 per share, that whatever improvement had occurred in its value had been largely due to the voluntary sacrifices of the common stockholders in foregoing the payment of dividends, though earned, in order to build up cash with which to pay out the preferred stock pursuant to the command of the statute, and the

further sacrifices of the common stock in disposing of valuable assets at great loss in order to raise additional moneys necessary to pay out the preferred stock, all conclusively indicated that under the fair and equitable standard prescribed by the Act the preferred stock was not entitled to more than $100 per share.

The theory upon which the Commission decided that the preferred stock was entitled to call premiums, which under the charter were to be paid only upon a *voluntary* dissolution, was due to a misconstruction of the decision of this Court in the *Otis* case. The Commission held that the *Otis* case does away with the charter provisions of a holding company which is being dissolved under Section 11 of the Holding Company Act and that the rights of the preferred stockholders in such liquidation must be considered without reference to the charter, except in so far as the charter places a ceiling on the amount payable to the preferred stockholders on the voluntary redemption of their stock. We respectfully submit, however, that this Court did not in that case hold that upon a true liquidation of a holding company the charter provisions do not apply. In the Otis case, United Light and Power Company was the top holding company of an extensive utility system with many subsidiaries. Directly beneath it was another holding company known as United Light and Railways Company. The plan of simplification was drawn under the so-called "great grand-father clause" of the Holding Company Act. There was no real dissolution of the business of Power as a going enterprise. The enterprise continued on as before. The only question that was involved was whether Power, the top holding company, should be succeeded by Railways, its sub-holding company, which would receive all the assets of Power. The stockholders of Power became the stockholders of Railways, so that we had in that case purely a corporate simplification which in no way affected the continuance of the enterprise. This Court in its majority opinion laid great stress on that fact,

stating that it was not the intention of Congress that under a mere simplification (when the same result could have been secured by a merger of Power and Railways), substantial rights should be destroyed, and that it was not contemplated that Power's charter should apply to such a situation.

Assuming that the *Otis* case does apply and that Engineer's charter may be overriden and disregarded, we contend that the Commission improperly applied the "fair and equitable" standard of the Holding Company Act in measuring the rights of Engineer's preferred stock. The Commission, disregarding its previous determinations and technique in determining what was the "fair and equitable" equivalent of the rights surrendered adopted a new technique which it called the "investment value ex the Act" formula. In other words, the Commission held that the fair and equitable standard of the Holding Company Act required it to assume that there was to be no dissolution of Engineers, that the enterprise was to continue and that the preferred stock must be valued upon that fictitious assumption. We contend that there is nothing either in the *Otis* case or in the Act which permits such an assumption; that such an assumption is contrary to the facts and that any alleged values based upon such assumption must necessarily be unrealistic and false.

We contend that even under its novel technique of "investment value ex the Act" theory, the Commission did not properly apply the fair and equitable standards prescribed by the Holding Company Act in that it failed to properly measure the investment value of the preferred stock and failed completely to give any consideration to the investment value of the common stock. The Commission, in appraising the so-called investment value of the preferred stock, gave consideration mainly to the testimony of a witness, Badger, who testified to the theoretical value of Engineer's preferred stock as of January, 1946, at a

time when admittedly all stocks including public utility stocks were at their highest and when interest rates were at their lowest. He arrived at his theoretical valuation by comparing Engineer's preferred stock with the current *market prices* of various other utility company stocks, which he said were comparable. His testimony as to the theoretical market value of Engineer's preferred stock is therefore based entirely upon *market prices,* which fluctuate from day to day (Finding 42, R. 310a) and which he took as of a particular day at the top of the post war boom. He gave no consideration to the market prices of the so-called comparable stocks over any substantial period of time before he gave his testimony, nor did he attempt to forecast their earnings or the earnings of Engineers for any period of time thereafter (R. 2077a). He admitted that interest rates at that time were the lowest in the history of the country, and (Finding 49, R. 313a) predicted that such rates would be permanent. He admitted that the current prices of utility preferred stocks were based upon the current low level of interest rates. Since the giving of such testimony interest rates have gone up substantially and the market prices of the "comparable" stocks has dropped considerably (Finding 52, R. 314a). It is apparent therefore that Badger's testimony had no probative force as proof of the *investment* value of Engineer's preferred stock, but that it was purely testimony as to theoretical market value, based upon the condition of the stock market at the time that he testified, which happened to be at the top of the post war stock market boom.

There is no necessity for remand. The legal effect of the proceedings before the Commission and the lower courts was that the Commission gave advance approval to a plan which contained, through the medium of an escrow agreement, alternative provisions. Under the first alternative the preferred were to get their call prices. Under the other alternative the preferred were to get such amount from $100 a share up to the call prices as was judicially approved.

The supplemental opinion and order of January 8, 1947 (R. 128a) of the Commission and its application of January 9, 1947 (R. 4a) submitted an amended plan (with provision for an escrow) to the District Court for enforcement. During the course of the proceedings before the District Court, and before its final order was issued, the Commission at the hearing before the District Court on February 17, 1947, amended its application (R. 162a, 164a). Its amended application, which was granted (R. 163a), submitted the plan in alternative form for approval and enforcement (R. 165a-174a) by the inclusion of the escrow agreement. The escrow provided for such advance approval by containing provisions making it a two-way escrow under which the funds might be awarded either to the preferred stock or to the Company. If the District Court approved the payment of the call prices and all remedies on appeal were exhausted, the escrowee would pay out the call prices to the preferred stockholders (R. 173a) or, in the alternative, the District Court might approve the payment of only $100 per share and when all rights of appeal were exhausted the escrowee would pay the fund back to the Company (R. 174a).

At this point the Commission had submitted the plan to the District Court for approval in alternative form. The Court found $100 to be fair and equitable and adopted in its order (R. 318a-330a) the escrow agreement which the *Commission* had submitted to it (R. 416a-422a).

The legal effect of the foregoing is that the Commission submitted for approval and enforcement a plan with two alternatives, one of which (payment of the call prices) it approved without qualification and the other of which it approved in advance with a condition subsequent, namely, the entry of an order by the Court, no longer subject to appeal, finding it was fair and equitable to pay an amount, from $100 to the call prices, designated in the order. If this Court affirms, there is consequently no need for remand.

POINT 1

The District Court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable.*

Section 11 (e) of the Public Utility Holding Company Act, provides that "the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after *notice* and opportunity for *hearing*, shall approve such plan as *fair and equitable* and as appropriate to effectuate the provisions of Section 11, the court as a court of equity, may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located". It will be noted that the statute provides for a *hearing* before the District Court, after *notice*. It also designates the District Court as a "court of equity" in carrying out the plan. If the District Court were limited merely to "carrying out the terms and provisions of such plan", in accordance with the findings of the Commission, there would have been no point in the provision for notice and a hearing, and that the Court may carry out the plan only if it "shall approve such plan as fair and equitable". It is perfectly clear, therefore, that Congress gave to the District Court the duty of inquiring into the fairness of the plan and of forming its own independent judgment thereon.

This conclusion is reinforced by the provisions of Section 24 (a) of the Holding Company Act, which provides for direct review by the Circuit Court of Appeals of an order issued by the Commission. This section provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be *conclusive*".

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* Italics in all instances supplied by us.

No such limitation was placed upon the power of the District Court in connection with the application under Section 11 (e). It must be perfectly clear, therefore, that in a Section 11 (e) proceeding, it is the duty of the District Court to make an *independent* examination into the question of whether or not the plan is fair and equitable, and the cases so hold.

> *Okin* v. *S. E. C.* (C. C. A. 2, 1944), 145 F. 2d 206;
> *In re S. E. C.* (*Otis & Co., Intervenor*) (C. C. A. 3, 1944), 142 F. 2d 411;
> *Lownsbury et al., v. S. E. C.* (C. C. A. 3, 1945), 151 F. 2d 217.

The foregoing principle, enunciated by Judge Leahy, that "a Sec. 11 (e) court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable" is not objected to on the part of the appellants. When the District Court, in

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[1] Brief for Appellants, Streeter et al., in the C. C. A., p. 16: "We do not quarrel with Judge Leahy's statement that a Section 11 (e) court has the affirmative and independent duty to consider and find whether a proposed plan, approved by the Commission, is fair and equitable."

Brief for Appellants, Home Ins. Co., et al., in the C. C. A., p. 14: "While Section 11 (e) gives the court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed." (See brief in this Court, p. 39.)

No reference to this principle is made by the S. E. C. due, undoubtedly, to the fact that it has consistently conceded this point.

See, *In re Interstate Power Co., et al.* (D. Del. 1947), 71 F. Supp. 164, where Judge Leahy said (p. 168): "Since one of the earliest cases for federal district court enforcement under the Act was brought to me for consideration and approval, it has been consistently conceded by all parties, including the various sets of attorneys for the S. E. C., in this and in all other cases brought to the enforcement court, that a Sec. 11 (e) court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable: and consequently such a court must consider whether the senior security holders are to get the 'equitable equivalent' of the rights which they are asked to surrender, *i. e.*, is the plan fair and equitable to the security holders affected by it?"

applying that principal, however, found that the proposed plan, only insofar as it proposed to pay to the preferred stockholders a premium of $3,200,000, was not fair and equitable, then charges that the District Court was trying the matter *de novo,* that the District Court was improperly asserting a greater power than the Circuit Court of Appeals possessed, and that the District Court is improperly substituting its judgment for that of the Commission, were let loose upon the head of the District Judge.

The inference that the District Court was determining this matter *de novo* finds no basis in fact in this case. No new proof was submitted by the common stockholders or considered by the Court. All of the evidence considered by the District Court in arriving at its determination of what was "fair and equitable" in this particular case is derived from the record and extensive hearings before the Commission. How could any court determine whether a plan was "fair and equitable" without an examination of the facts?

The function of the District Court in this respect was succinctly stated in *Electric Bond & Share Co.* (S. D. N. Y. 1946) 70 F. Supp. 426 (Leibel, D.J.):

> "The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. *To do this the Court must examine the plan and the record upon which the Commission's approval of the plan was based.*"

Even in a case where the plan is considered by the Circuit Court of Appeals directly by appeal through Section 24(a), the Circuit Court, although restricted by Section 24(a), must and does consider the facts. Yet when the District Court in the instant case, examines the evidence, and fails to agree with the conclusions of

the Commission, it is charged with conducting a trial *de novo*. (See SEC brief C. C. A., p. 16, footnote 20).

The contention of appellants, Streeter, et al. and Home Insurance Company, et al. that a District Court should have no greater powers, in considering and finding whether a proposed plan is fair and equitable, than the Circuit Court of Appeals, has under Section 24a, finds no support in the decided cases and is directly contrary to the provisions of the Holding Company Act.

Thus in the case of *Okin* v. *Securities and Exchange Commission* (C. C. A. 2, 144), 145 F. 2d 206, the Commission moved to dismiss the petition of Samuel Okin for a review of a Commission order conditionally approving a plan for the reorganization of United Gas Corporation. The petitioner based his right to review on Section 24 (a). The court, in granting the motion of the Commission, said (p. 207):

> "The broad terms of review accorded by Sec. 24 (a) of the Act of course shows a general legislative intent to give parties aggrieved by Commission orders the opportunity to present their case for review to the circuit court of appeals of their own circuit, and there is no exception in terms for orders which must be brought for enforcement to a district court. Thus, the situation here presented appears to be one not directly contemplated by the lawmakers. It seems clear, however, that a rational interpretation of the entire statute must support the Commission's view if all parts of it are to be given due weight and application, and a consistent and workable scheme of enforcement, as well as of review, is to be applied. *The provisions of Sec. 11 compel full review of an order such as this in a district court* for all parties in interest, thus making limited reviews for single parties in interest in other courts quite intolerable

for the conflicts in jurisdiction which must result; and the broad scope of review stated in Sec. 24 becomes in terms inapplicable because of the interlocutory nature of the Commission's action in the circumstances."

* * * * * * * *

And at page 208:

"Which of two probably conflicting orders should prevail is, of course, not made clear; since the *district court has the ultimate responsibility for determining whether the plan is fair and equitable,* it would seem that in final analysis that court must have authority to nullify any opposing action of any other court."

In the case of *In Re Securities and Exchange Commission* (Otis & Co., Intervenor) (C. C. A. 3, 1944), 142 F. 2d 411, the Circuit Court of Appeals, 3rd Circuit, rejected the contention that the hearing before the District Court was a mere "summary proceeding". At page 421, *supra,* this Court said:

"In Commonwealth & Southern Corp. v. Securities and Exch. Com'n, 134 F. 2d 747, 753, we indicated that stockholders whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure had a right to be heard in that District Court of the United States in which the Commission was seeking to effect its order; that otherwise those stockholders would be deprived of property without due process of law. It follows that *the proceeding before the District Court cannot be deemed to be a summary one.* Moreover, the fact that notice is to be given to the persons affected by the plan shows that the theory

of submission to the District Court is substantially similar to that required in respect to a plan made pursuant to the provisions of Section 77B or Chapter X of the Bankruptcy Act. True, the issues presented to the District Court are limited to the matters prescribed by the statute but this is the extent of the limitation."

In the case of *Lownsbury et al.* v. *S. E. C.* (C. C. A. 3, 1945), 151 F. 2d 217, petitioners, stockholders of the Commonwealth & Southern Corporation, asked the Court for a review of orders of the Commission and for a stay of all proceedings pending review by said Court. The petition for a review was dismissed and the motion for a stay denied. Judge Biggs, in his concurring opinion, stated (p. 219):

> "The Commission takes the position that this court is without jurisdiction to review the decision of the Commission, pointing out that effectuation of Commonwealth's plan is conditioned by the terms of the Commission's order upon approval by a majority of each class of stock affected and by a district court of the United States pursuant to Section 11 (e) of the Act; that since the order is so conditioned the petitioners are not 'aggrieved' by it within the purview of Section 24 (a); that the right of the petitioners to test the question of whether the plan is fair and equitable and appropriate to effectuate the provision of Section 11 must be *tried* in a district court."

* * * * * * * * *

> "But the important factor insofar as the review machinery of Section 11 is concerned is that Congress intended that if the holding company came into a district court of the United States and jurisdiction

was acquired by that court because of the failure of the company to obey the integration or simplification orders of the Commission or by virtue of the provisions of some other federal statute or law; that court should adjudicate *all* questions relating to integration, simplification and the *fairness and equity of the plan.* In other words, it was the intention of Congress if jurisdiction was vested in a district court, that *that court* and not a circuit court, *should pass on the plan* and determine and execute the course necessary for the integration and simplification of the holding company structure."

In an effort to overcome the effect of the District Court's decision in denying a premium to the preferred stockholders, appellants have attained the height of inconsistency. While on the one hand they concede that the District Court has the affirmative and independent duty to consider and find whether a proposed plan, approved by the Commission, is fair and equitable, on the other hand, they contend that the District Court may not consider the matter *de novo;* that the District Court may not substitute its conclusions for the conclusions of the Commission; that the District Court has no greater powers than the Circuit Court of Appeals under Section 24 (a) as to facts found by the Commission.

Of course, appellants deny that the hearing before the District Court is a mere "summary proceeding" or that the enforcing court is a mere rubber stamp for administrative action—but these arguments lead to no other conclusion than that where the Commission has arrived at its decision, the District Court must blindly approve its conclusions. And to bolster their point, appellants raise the spectre of chaos haunting the administration of the Act if a District Court be permitted to disagree from its conclusions.

The answer, of course, is that when it passed the Holding Company Act, Congress presumably knew that we have District Courts in different parts of the country. Congress, however, saw fit not to give the Commission *exclusive* power to pass on the fairness of a plan of liquidation, but made that power subject to review by the District Court, after notice to the parties and a hearing. Had Congress, in the interest of "finality" and "uniformity" desired to give the Commission *exclusive* jurisdiction and make their findings and decision final, it would have said so, and would not have given to the District Court the power and the duty to hold a hearing to pass on the fairness of the plan, before issuing its enforcement order. Appellant's quarrel, therefore, is with Congress, and not with the Courts below.

Judge Biggs, writing for the Court below, made an exhaustive analysis of Section 11 (e) of the Holding Company Act, its history and interpretation as shown by the debate in the United States Senate, by the interpretation of the Commission itself and by the courts, and by the testimony of a former chairman and former head of the Public Utilities Division of the Commission (R., Vol. VI, pp. 20-35). The Court below called attention to the report of the Senate Committee which reported out the original bill, and which stated that the Federal courts to which plans are presented "may exercise in the furtherance of such voluntary plans all the extraordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Act(s) to effect compulsory corporate readjustments required by the public policy expressed in those Acts" (R., Vol. VI, pp. 21-22).

Judge Biggs further referred to the Congressional debates which attended the passage of the Act and stated that "again and again members of Congress demanded and received assurances that the plenary jurisdiction and powers of the District Courts of the United States would

not be diminished or encroached upon by the functions allotted to the Commission under the law" (R., Vol. VI, p. 22). Judge Biggs then referred to the testimony given by Ganson Purcell, a former chairman of the SEC and Milton H. Cohen, a former Director of the Public Utilities Division of the SEC, given before one of the Committees of the House of Representatives, in which Mr. Purcell stated that the security holders' "treatment must be found by the *Courts* and the Commission to be fair and equitable", and that the *District Court* is required to find under Section 11(e) that the plan is fair and equitable. Mr. Milton H. Cohen testified that the District Court "has the *independent duty* of determining whether the plan is fair and equitable. * * *" (R., Vol. VI, pp. 23-24). Judge Biggs then referred to the 10th annual report to Congress of the SEC dated April 21, 1945 in which the Commission said "Thus security holders have the protection of findings as to the fairness and equity of plans by both the Commission and a *United States district court*" (R., Vol. VI, p. 24).

Judge Biggs thereupon turned to the internal evidence contained in the Act itself as to the intent of Congress respecting the functions of a district court and of the Commission. He said "The words employed respecting the respective duties of Commission and Court are so alike that we must conclude that Congress intended to lay substantially the same duty on the Court in the second instance as it imposed on the Commission in the first. Surely, had Congress intended that the District Courts of the United States should exercise only the function of review, other and more appropriate language would have been employed" (R., Vol. VI, pp. 24-25).

The Court below thereupon discussed the phrase that "the Court as a *court of equity* may * * * take exclusive jurisdiction of the holding company's assets * * * for the

purpose of effectuating the plan * * *." It said, "We think that Congress employed the phrase 'as a court of equity' classically, intending to require the district courts in Section 11 (e) proceedings to exercise in connection with the approval or disapproval of a plan the traditional powers of a court of equity in deciding that justiciable issue; that is to say, to administer justice in the traditional manner of a court of equity" (R., Vol. 6, p. 25).

Judge Biggs then points out that the phrase "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive", contained in Section 24, which provides for direct review by the C. C. A. of orders of the Commission, have been significantly omitted from Section 11(e) (R., Vol. 6, p. 25).

Judge Biggs thereupon points out that the Section 11(e) Court may hear the application for approval of the plan only "after notice and opportunity for hearing" and states "It was the manifest intention of Congress to give all persons who might be affected by the plan a day in court in an equity proceeding" (R., Vol. VI, p. 26).

The Court below then went on to say:

> "It seems improbable to us that Congress intended that the district courts of the United States should be limited to the function of mere review under the Public Utility Holding Company Act, *the only federal reorganization statute by the terms of which security holders are not permitted to vote their approval or disapproval of a proposed plan of reorganization* and to prevent its operation if the holders of the requisite amounts of the securities affected are not in favor of it" (R., Vol. VI, pp. 26-27).

Judge Biggs thereupon exhaustively analyzed the history of the Federal law of reorganization and came to the

conclusion that the same supported his view that a Section 11(e) court must function as an equity reorganization tribunal (R., Vol. VI, pp. 27-34).

The learned Circuit Judge thereupon said:

> "We conclude that it was the duty of the court below to function as an equity reorganization tribunal within the limitations prescribed by the Act. The findings and conclusions of the Commission were not binding upon the learned District Judge though, as was proper, he treated them with respect. He weighed the numerous elements involved in the case, albeit on his own scales, and in the exercise of his independent judgment arrived at the conclusion that the plan was not fair and equitable. The examination made by the District Court of the relevant factors was careful and far-reaching" (R., Vol. VI, p. 34).

With reference to the cases of *Lahti* v. *New England Power Association*, 160 F. 2d 845, 858 (C. C. A. 1, 1947), and *Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 151 F. 2d 424, 430 (C. C. A. 8, 1945), which the Court below referred to as looking the other way on the question of the duty of the District Court to make an independent examination of the record and findings of the Commission under Section 11(e), we respectfully submit that neither of these cases is authority for the proposition that the District Court is merely a review court with limited powers. In both of these cases the question raised here, namely, whether the District Court must make an independent examination and affirmatively find the plan to be fair and equitable was not raised. In both these cases the District Court *agreed* with the finding of the Commission that the plan was fair and equitable and the question of the extent of its review of the Commission's decision was not in issue.

POINT II

The *Otis* case does not hold that upon a true liquidation of a holding company the charter provisions do not apply.

Appellants base their case upon the contention that the *Otis*[1] case does away with the charter provisions of a holding company which is being dissolved under Section 11 of the Public Utility Holding Company Act, and that the rights of the preferred stockholders in such a liquidation must be considered without reference to the charter, except insofar as the charter places a ceiling on the amount payable to the preferred stockholders on a voluntary redemption of their stock. An analysis of the decision of this Court in the *Otis* case discloses, however, that it laid down no such rule. In that case, the facts were substantially as follows:

United Light and Power Company was the top holding company of a very extensive utility system, with many subsidiaries. Directly beneath it was another holding company known as United Light and Railways Company. The plan of simplification was drawn under the so-called "great grandfather" clause of the Public Utility Holding Company Act which provides that the Commission shall take action—

> "* * * that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *"

It was pursuant to that provision of the Act that this simplification proceeding was brought.

There was no real dissolution of the business of United Power as a going enterprise. The *enterprise* continued on

[1] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624.

just the same as before. The only question that was involved was whether the top holding company (namely "Power") should be succeeded by its sub-holding company (namely "Railways") which would receive all the assets of the top holding company. The stockholders of Power became the stockholders of Railways, so that we had in that case purely a corporate *simplification* proceeding which in no way affected the business of the enterprise itself.[1]

The Commission forcefully presented to the Court below its contention that the *Otis* case relates solely to a corporate simplification. In its brief, Commission counsel stated (pp. 37-38):

> "These stockholders will continue to remain the residual owners of the same public utility system, for the principal result accomplished by compliance with the Commission's order of dissolution has been to crack off one of the corporate shells through which their ownership was held, and to transform their interests into stock in the next corporate shell, Railways. Power is being dissolved, but the enterprise is not."

And the Commission before this Court again stressed the continuing nature of the enterprise when in its brief it stated (p. 78):

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[1] These points of distinction were well brought out by the District Court (held by Judge Leahy) in its opinion (*In re United Light & Power Co.*, 51 Fed. Supp. 217, 223):

> "There is no real finality to this particular dissolution. Power's shareholders simply transform themselves into holders of common stock of Railways and thus obey the demands of Congress. Power as the head of a holding company system is now declasse by Congressional mandate; the interests of all classes of stock are nevertheless still lodged in a continuing enterprise.
>
> "It is neither an exercise in semantics nor a rejection of labels to consider the present plan little more than a reclassification."

"Finally, in no realistic sense is there occurring in this case a dissolution of a business enterprise which should call for the application of a charter liquidation provision. As the opinion of the majority of the Commission discloses, the preferred and common stockholders of Power have been the residual co-owners of a vast public utility system controlled through Power, the top holding company, and Railways, its principal subholding company subsidiary. These stockholders will continue to remain the residual owners of the same public utility system, for the principal result accomplished by the Commission's order is to crack off one of the corporate shells through which their residual ownership was held and to transfer their interests to the stock of the next corporate utility, Railways. In essence, therefore, while Power is being dissolved the enterprise is not."

The majority members of this Court apparently agreed with the argument of the Commission, inasmuch as the majority opinion laid great stress on the fact that in the *Otis* case there was no true liquidation of the enterprise but merely a simplification and that under a mere simplification it was not the intention of Congress that substantial rights should be destroyed. The question in the *Otis* case was whether the common stock of "Power", which at that time had an equity in present earnings of over $2,500,000 per year, should be completely wiped out because the SEC had ordered a simplification of the capital structure of the system. That in substance is what this Court, in its majority opinion, stated the question to be. In this connection we should point out that the decision of this Court was by a sharply divided Court,—five to three,—the dissenting judges being Chief Justice Stone, and Justices Roberts and Frankfurter.

An examination of the opinion of Mr. Justice Reed, writing for the majority, will show very clearly the distinction between the *Otis* case and the case at bar: Mr. Justice Reed at page 631 said:

"The Commission's order of March 20, 1941, for the liquidation and dissolution of Power was a step in the *simplification* of the holding company system which *simplification* was enjoined by section 11(b)(2) of the Act. Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for *merger, consolidation* or *recapitalization* between top holding companies or between associate companies in the lower tiers of the corporate hierarchy. *Such procedure would avoid the liquidation of Power.* Cf. Windhurst v. Central Leather Co., 105 N. J. Eq. 621, 149 A. 36; Porges v. Vadsco Sales Corporation, Del. Ch., 32 A. 2d 148, 151. The selection by the Commission of *one* method of system adjustment to accomplish simplification *rather than another is an incident which ought not to affect rights.* The exercise of legislative power by Congress through section 11(b)(2) to accomplish *simplification* as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the '*liquidation* of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock. * * *"

The Court then went on to say that upon analysis of the holding company system's experience, and upon an estimate of future earnings, the Commission assumed earnings of $6,185,000 annually. Since the annual preferred dividend requirements were $3,600,000 there appeared a balance of $2,585,000 available for the reduction of preferred

stock arrearages of $38,700,000. The Court then went on to say:

"* * * The Commission noted that if all the assumed earnings materialized and were applied to liquidating the preferred current and deferred dividends, in approximately fifteen years the arrearages would be paid and the common stockholders would be in a position to receive dividends. Furthermore, *only by forced liquidation could the common stock be deprived of its possibility for future earnings.* Only by means of forced liquidation and the receipt of all Railways common, could Power's preferred gain a right to prospective earnings *above* its guaranteed dividends. * * *" (p. 632).

The Court then quoted from the message which the President sent to Congress in connection with the pending Public Utility Holding Company bill (p. 636):

"'Such a measure will not destroy legitimate business or wholesome and productive investment. It will not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor. S. Rep. No. 621, 74th Cong., 1st sess., p. 2.'

"That report urged the same care to investors:

'Simplification and reorganization of holding company structures, making possible within a reasonable period the practical elimination of the holding company, should be conducted under the Commission's supervision over a period of time to prevent undue losses to security holders from investment dislocations, Id., p. 60'."

The Court then added at page 636:

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them."

This Court then went on to say that *simplification* having as an incident to it the dissolution of *one* company in a *holding company system* was not an anticipated "liquidation" within the meaning of Power's charter provision. Mr. Justice Reed said at page 637:

> "We think, however, the charter preference is inoperative in *simplification* under section 11(b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a '*simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation'* within the meaning of Power's charter provision. Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. *Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation,* which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken."

In the *Otis* case we have the following factors present, all of which are absent here:

(1) The common stock which the preferred stockholders wanted to wipe out had a very large equity in present earnings, over $2,500,000 a year above preferred dividend requirements. In the present case we seek to wipe out no class of stock.

(2) The *Otis* case was a *simplification* pure and simple, of a holding company system, the cracking off merely of the *top* company of the corporate hierarchy. In the present case we have an actual, bona fide *liquidation* and *dissolution* of the whole *enterprise*.

(3) In the *Otis* case, the stockholders of the top holding company became stockholders of the next sub-holding company. In this case no holding company remains, the *system* is disintegrated.

(4) The *Otis* case involved merely the exchange of stock in a top holding company for stock in a sub-holding company, which had substantially the same assets. In the present case the preferred stockholders are paid out in *cash*, one hundred cents on the dollar.

(5) In the *Otis* case the method chosen by the Commission, for simplifying the holding company system was only one of several methods which might have been adopted, and the same result secured. Had one of the other methods, namely, the device of merger between the top holding company and the sub-holding company been adopted, the requirement of the statute would have been complied with, corporate simplification would have been accomplished and the rights of the common stockholders would have been preserved. We have no such situation here.

It was under those circumstances that the Supreme Court said that that kind of "liquidation" was not contemplated

when Power's charter was adopted six years before the enactment of the Holding Company Act and that, therefore, it did not apply to a mere *simplification*. The Commission had awarded to the common stockholders as their interest in Railways the modest amount of $5\frac{1}{2}\%$ of the stock of Railways. The majority of this Court said that under those circumstances it was "fair and equitable" that the interests of the common stockholders should not be completely wiped out, but that as the top holding company was perfectly solvent, and as it had present earnings greatly in excess of the amount payable as current dividends on the preferred stock, that some recognition should be given to the common stock. We respectfully submit that this is entirely different from a holding that upon an *actual dissolution* of a holding company *where the enterprise comes to an end,* and where the preferred stockholders are being paid one hundred cents on the dollar of the principal of their claims, as provided by the charter (more than they originally contributed to the enterprise), that under those circumstances the charter provisions have no validity and that the rights of the preferred stockholders are to be considered as though the enterprise continued and no liquidation had taken place.

In their opinion in the *Otis* case this Court said (p. 636):

> "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders."

If the call premium, amounting to \$3,200,000, were to be awarded to the preferred stockholders, that is exactly what would happen here. These preferred stockholders will not receive stocks of fluctuating market value in another company, to be valued at a capitalization of so many times earnings (always a matter of opinion, the times earnings ratio fluctuating with the ups and downs of the stock market), and as to whose value there might be doubt and dispute. They are to be paid in *cash*. They are to receive

more than the amount that the company received from the original preferred stockholders at the time of the sale of the stock to them. In addition, they have received their full dividends, amounting to approximately $90 per share, while the common stockholders were getting nothing during most of this period, although the company had earnings which would have justified the payment of dividends. To require the company (*i. e.*, the common stockholders), in addition to pay to these preferred stockholders a premium of $3,200,000 would indeed be a windfall to the preferred stockholders at the expense of the holders of the common.

In the *Otis* case, the Court was protecting the rights of common stockholders who had a very substantial equity in the earnings of the company, which it was sought to wipe out. It awarded to them a very modest interest in the sub-holding company. In the present case, we have the situation of the preferred stockholders who are not satisfied with receiving everything the charter gives to them but want more than the charter provides, namely a call premium, as though the company was not being involuntarily liquidated but was continuing on as a going business enterprise, and the company had *voluntarily* called its stock. The preferred stockholders say in substance we think the *investment value* of our stock in January, 1946, would have been more than $105 or $110 a share if the company had continued in business, and we want to get that even though the company is compelled to go out of business.

It is a matter of common knowledge that the reason that a call premium is usually provided for in the case of a redemption of either bonds or preferred stock is that such redemptions are usually made in periods of low interest or dividend rates, when the called bonds or stock can be replaced with bonds or stock carrying a lower interest or dividend rate, and it is therefore considered fair, under those circumstances, that the company (which benefits by the redemption) should pay to the holders of the bonds or stock, who are deprived of a favorable investment, a bonus

or premium for the deprivation. In this case, however, no such reason exists. The preferred stock is not being replaced with other stock carrying a lower dividend rate, it is being retired because Engineers, by command of the statute and of the SEC has been required to discontinue business and dissolve. Engineers derives no benefit, but rather suffers a detriment, from the retirement of this stock.

POINT III

The District Court and the Court of Appeals properly found that payment to the preferred stockholders of $100 per share was fair and equitable.

The District Court in performing its affirmative and independent duty to consider and find whether the proposed plan was fair and equitable carefully examined the plan and the record upon which the Commission's approval of the plan was based. The District Court's findings of fact, and the record of the Commission upon which they are based, substantiate beyond any question that the plan approved by the Commission failed to satisfy "fair and equitable" standards. An examination of the record and of the findings of the District Court establishes the following facts:

Upon the sale of the preferred stocks Engineers received less than $100 per share therefrom. On the $5 stock it received only $95 per share (District Court's findings, par. 22, p. 301a).[1] Both the $5 and the $5.50 preferred stocks carried conversion privileges into common, which were apparently considered necessary to secure their purchase by the public, indicating that at the time of their issuance their investment value without the conversion privilege was not equal to the amount for which they were sold to

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[1] Page references are to Record.

the public. The $5 series reached a high of $123 in 1929 and a low of $10⅛ in 1935. Its overall average since issuance was $67.16. The $5.50 series reached a high of $109 in 1929 and a low of $11 in 1933 and 1934. Its overall average since issuance was $64.54. The $6 preferred reached its highest market price of $109 in 1945 and sold at a low of $12 in 1933; its overall average since issuance is $62.77 (Finding 24, p. 302a). The District Court found that "the market prices of the preferred stocks in the earlier years must be considered in the light of the warrants and conversion features operative in that period, and in the light of the fact that Engineers common sold as high as $79⅝ per share in 1929. The market prices in recent years must be considered in the light of the extensive market purchases made by Engineers, referred to below, and other extrinsic factors such as the Commission's American Power & Light debenture decision (Holding Company Act Release No. 6176) wherein premiums were awarded senior security holders for the first time" (Finding 25, p. 302a.

No dividends were paid on the preferred stock from July 1st, 1933 to July 31st, 1936, but the arrearages were paid off in 1936 and 1937. As of December 31st, 1946 Engineers had paid the following dividends on the preferred stocks:

> $5 series, $86.25 per share. $5.50 series, $93.50 per share. $6 series, $90 per share (Findings 26, pp. 302 and 303a).

There are 1,909,968 shares of Engineers common stock outstanding, owned by more than 13,000 stockholders. The aggregate consideration received by Engineers for such shares was $58,059,512.85 (Finding 30, p. 305a).

From the date of Engineers organization in 1925, down to the retirement of the preferred stock—a period of 22 years—the common stock received cash dividends of only $4.70 per share (Finding 33, p. 305a). If averaged over

this period it would amount to 21¢ per share per annum. If figured on the average price received by Engineers on the sale of the stock of $30.40 per share, it would amount to 7/10ths of 1% per annum as contrasted with the receipt by the preferred stock of from 5% to 6% per annum.

From September, 1935 to the end of 1944 earnings accrued to the interest of the common stockholders of approximately $24,500,000, none of which was distributed. Since that time this amount has necessarily increased (Finding 34, p. 306a).

As of June 30th, 1945, subsidiaries of Engineers had $2,773,000 of free earned surplus and Engineers itself had $7,095,000 of free earned surplus, or a system total of $9,868,000 which could have been declared out in dividends to the common stockholders (Finding 35, p. 306a). Since that time this amount had also increased. This deprivation on the part of the common stockholders has been of substantial benefit to the preferred sockholders (Finding 36, p. 307a).

Engineers sustained substantial losses on many of its properties sold in compliance with the Commission's divestment orders. Its interest in Puget Sound Power & Light Company, which cost Engineers $34,000,000 was sold for only $774,475. A formal offer of proof was made before the Court to establish that the equity owned by Engineers in Puget Sound would presently have a cash value of $10,000,000. Substantial book losses were also sustained by Engineers on the sale of its investment in other subsidiaries. In the case of El Paso Natural Gas Company, whose stock was sold by Engineers pursuant to the order of the Commission, the market price of the stock sold increased by more than $4,000,000 over the price realized (Finding 37, pp. 307a and 308a). The brunt of the losses and deprivations caused by the Holding Company Act has fallen upon the common stockholders (Finding 38, p. 308a).

In order to carry out the plan the common stockholders were obliged to contribute to Engineers the sum of

$22,000,000 through the exercise of warrants to purchase the common stock of Engineers' subsidiary, Gulf States Utilities. In addition, to carry out the plan $3,800,000 were received by Engineers in the form of "advance dividends", paid by Engineers remaining subsidiaries, on condition that no further dividends may be paid by such companies for specified future periods of time extending until June 15, 1948 (Finding 39, p. 309a). The common stockholders who are to receive these stocks were thereby foregoing their future dividends to the extent of $3,800,000.

The claim that the opinion testimony of R. E. Badger as to the "investment value" of Engineers preferred stock stands uncontradicted, is not borne out by the record. Badger testified that "exclusive of the impact of the Public Utility Holding Company Act of 1935" the Engineers preferred stocks would, at the *time of his testimony* have sold at a 4.6% yield basis (or $108.70, $119.57 and $130.33 respectively ~~for~~ the $5, $5.50 and $6 series), *if the preferred stocks were not subject to call.* In view of the redemption provision he concluded that "the present fair investment values are represented (substantially) by the call price". In connection with his testimony, Badger presented a report on valuation of Engineers preferred stock "as at January 15, 1946" (Ex. 29a, p. 2088a *et seq.*). In that report Badger stated:

> "It does not require an exhaustive presentation of statistics to show that the yields on preferred stocks are, at the present time, the lowest which they have ever been in the history of our country, or conversely, that the *prices* of such stocks are at the *highest* levels ever experienced. *The permanency of this situation will depend on the permanency of low interest rates.* * * *" (p. 2096a).

It is quite apparent, therefore, from Badger's own report that he based his opinion of investment value on market prices of allegedly comparable stocks in a period (Janu-

ary, 1946) when stock prices were at their highest and interest rates were at their lowest. He coupled this with the prediction, *since proven wrong*, that the present level of preferred stock prices is a permanent level. He also based his valuation upon a capitalization of "two year average earnings of the major subsidiaries held by Engineers at December 31, 1944, on the assumption that the equities in these companies were worth 15 times two year average earnings" (R. 2104a). It is a matter of common knowledge, and the Court may take judicial notice of the fact, that since January 1946 there has been a considerable decline in the market value of public utility company stocks (as well as of stocks generally) and that the price earnings ratio at which utility stocks are now valued has declined considerably below the times earning ratio which existed in January 1946. In most instances the ratio now is 8 to 10 times earnings, and in many instances less. In addition, it should be noted that Badger based his opinion on only two years of earnings, namely 1943 and 1944. During this period the country was at war. Abnormal boom conditions prevailed throughout the country and particularly in the territory served by Engineers' important subsidiaries, as in Norfolk, Virginia, where an extensive shipbuilding program was going on. Two years' earnings in any period are insufficient to base an opinion of sound investment value, and certainly not two years of abnormal earnings during a war which caused the greatest boom period that this country had ever experienced.

While Badger termed Engineers preferred stocks as of "medium grade" D. C. Barnes, the President of Engineers, who also qualified as a financial expert, classified them as "closer to a low grade preferred stock". The District Court found that the evidence supports this view (Finding 44, p. 311a). Mr. Barnes further testified that the future price level of these securities,

> "without the impact of the Public Utility Holding Company Act, could move from its present level in

only one direction, since the voluntary redemption price acts as a stopper to prevent any material rise in price over the respective voluntary redemption price, whereas adverse conditions which we are bound to meet from time to time in the future as we have in the past would be reflected in declines in prices from this top level" (p. 523a).

Mr. Barnes then testified to four factors which, in his opinion, might adversely affect the investment value of Engineers' preferred stocks, as follows:

"The factors which might affect the future price level adversely are: (1) continued inflation. The country is now facing wide-spread demands from labor for 30 per cent increase in wages. The former chairman of the War Labor Board has indicated that in his opinion, in a five-year period, wages may be expected to go up as much as 50 per cent.

If any such inflation spiral is in store for us it will affect adversely the market prices for fixed income securities, particularly in regulated industries where there is an inevitable time lag in securing increased rates to cover increased costs.

(2) Periodic depressions. I do not believe that it is possible to develop a regulated economy which will continuously balance supply and demand. When these get out of balance to an extent that causes decreased employment, it is a characteristic of human nature which I do not believe can be changed to conserve resources and limit spending which further aggravates the dislocation of supply and demand.

We have had these cycles periodically in the past and I believe there is every reason to expect a continuance of them in the future. We have expanded our productive capacity in the last six years to provide the requirements of war and have built up a deficit in so doing of some $300,000,000,000.

During this period the supply of goods for civilian requirements has been withheld to a large extent and in the immediate future production to fill this demand may be expected to continue productive activity at a high level.

When this deferred demand has been satisfied we will be faced with the problem of readjusting supply to demand, and in my opinion it is reasonable to expect that during such readjustment we may have another of the periodic depressions.

(3) Possibilities of Government competition. There is agitation in Congress and elsewhere for substantial hydro developments by the Federal Government on rivers not only in areas adjacent to Gulf States Utilities Company, where the Southwestern Power Authority has been organized and is functioning, but also in the territories served by the Virginia Electric and Power Company, where developments have already been approved by Congress on the Roanoke River, although appropriation has not as yet been made.

Further developments have been recommended by the army engineers or studied by them for hydro plants on the James River and the Rappahannock River in Virginia. If such developments follow the pattern of those in the Northwest it will affect adversely the market prices for utility stocks in the areas affected.

(4) Adverse changes in the policy of regulatory authorities. If the principles of rate regulation advocated by some of the more radical exponents of regulation are later adopted by authorities having jurisdiction in the area served by Engineer's subsidiaries, it would also have an adverse effect on securities of companies doing business in those areas" (R. 523a and 524a).

Mr. Barnes has proven to be a far better prophet than Badger. Some of the potential factors to which Mr. Barnes referred have already become realities. Labor has already received wage increases which amount to much more than the 30% that Mr. Barnes referred to. In the light of present conditions the opinion of the former Chairman of the War Labor Board that in a five-year period wages may be expected to go up as much as 50%, has, in the light of what has happened since this testimony was given, been found to be much too conservative. Wages have already advanced more than that. It is a matter of common knowledge, and this Court may take judicial notice of the fact, that while *gross* utility company earnings have increased (owing to the present abnormally high rate of business activity), utility *net* earnings have not kept pace owing to the increases in labor costs, fuel and costs of replacement and repairs. At the present time, we are in the very midst of an acceleration of the "inflation spiral" to which Mr. Barnes referred, and which is already adversely affecting utility company earnings. Thus far we have had three rounds of wage increases granted to organized labor. Labor unions are already demanding a fourth round.

So far as the other factor upon which Badger relied is concerned, namely, low interest rates (which he assumed would be permanent), the record, since he gave his testimony, proves him to have been but a poor prophet. Between March 1946 and March 1947 yields on long term Government bonds had risen from 2.09% to 2.19%. They have since risen to 2.41% (see Weekly Outlook of Standard Statistics Co., a well recognized financial publication, dated Dec. 28, 1948). Highgrade bond yields had risen in the same period from 2.35% to 2.49%. They have since risen to 2.774% as of Dec. 28, 1948 (Weekly Outlook, Standard Statistics). On high grade preferred stocks the average yield had risen from 3.42% to 3.75%. They have since risen to 4.14% (See Weekly Outlook, Standard Statistics,

Dec. 28, 1948). The increase in yields on low to medium grade preferred stocks must necessarily be even greater (Finding 52, p. 314a). It is a matter of common knowledge, and this Court may take judicial notice of the fact, that interest rates generally since March 1947 down to the present time have steadily risen.

In contradiction of the permanence of the utility company stock prices testified to by Badger, we have the fact that the utility common stock average had dropped from $123 in March 1946 to $107 in March 1947. (Finding 52, p. 314a). It has since dropped to $104 (Standard Weekly Outlook, Dec. 28, 1948). Inasmuch as the investment value of a utility holding company's preferred stocks are necessarily dependent upon the value of the utility common stocks held by it, it necessarily follows that such an extensive drop would likewise affect the investment value of the preferred stocks.

The Court found that the investment values of Engineers preferred stocks, testified to by Badger:

> "* * * do not represent the investment value of these stocks in the past, and are by no means determinative of the investment value of these stocks for any considerable period of time in the future. * * *" (Finding 54, p. 315a).

Summarizing the various factors which go to make up the investment value of Engineers preferred stocks we find the following: Prior to the outbreak of the European war, Engineers (on a consolidated basis) barely earned its fixed charges and preferred stock dividends. The ratio was 1 1/10 times for 1937 and 1938 and 1 2/10 times for 1939 to 1942 inclusive. It was not until 1943 and 1944 (the peak of the war effort) that the ratio increased to 1.4 and 1.5 R. p. 64a). The earnings prior to 1937 do not appear to be in the record and were not considered by Badger, but undoubtedly they are unfavorable, inasmuch as En-

gineers, from 1933 to 1936 did not pay dividends on its preferred stocks. On the foregoing record we think it may fairly be said, and the Court was justified in finding, that Engineers preferred stocks were not even of medium grade, as testified by Badger, but were of low grade. That the market so rated them is evident from their violent fluctuations in market price to as low as $11. per share. Surely it can hardly be claimed that preferred stocks which sell in the market at an overall average price since issuance of from $62 to $67 per share are high grade, or even medium grade, preferred stocks. The acid test of the market place has classified them as being of distinctly low grade. The only reason that they sold at or above par recently is because the Company's plan called for their retirement at par, and the SEC required the payment of call premiums in addition.

Furthermore, it should be borne in mind that such investment value as has been attained in recent years by Engineers' preferred stocks was due in large measure to the sacrifices made by the common stockholders in foregoing dividends upon their stock for a period of nine years, although such dividends were earned and might have been paid. It was the retention of these earnings, amounting to approximately $24,500,000, and the reinvestment of a large part thereof in the properties, which increased the investment value of the preferred stocks.

It cannot be denied that the sacrifices which Engineers was compelled to make in the divestment of properties under the orders of SEC, amounting to many millions of dollars, must all necessarily be borne by the common stockholders, inasmuch as the preferred holders have already received par and all dividends, amounting to approximately $190 per share. In contrast to this, we have the meagre cash dividends which were paid to the common stockholders over a period of 22 years of the Company's existence, of $4.70 per share, amounting to an average annual return of 7/10th of 1%. In the face of all this the

preferred stockholders demand their "pound of flesh" by insisting that they must also receive a call premium of \$3,200,000, as though the retirement were voluntary and the enterprise were continuing.

We respectfully submit that to grant this demand would be grossly unfair and highly inequitable and unjust. As the Court below so aptly and concisely expressed it in the *Otis* case (142 F. 2d 411, 419):

> "Each security holder must be compensated as exactly as he can be for that which he is giving up. But though his cup must be filled level to the brim, it must not run over. This much is plain."

In its Conclusions of Law, the District Court stated:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable considerations warranting the payment to the preferred stockholders of amounts in excess of \$100 per share plus accrued dividends; and careful examination of all the relevant factors impels the conclusion that payment to the preferred stockholders of such excess amounts would not be warranted or justified" (R. 316a).

POINT IV

The Commission's newly adopted "investment value ex the Act" formula in valuing securities and arriving at "equitable equivalents" is unsound and leads to unjust results.

Contrary to its practice for years the Commission has in this case evolved a new "technique" in valuing securities by arriving at those values on the theory that the

Holding Company Act" does not exist, or that it had been repealed on the day of valuation, and that the enterprise would continue.[1] It called this the "investment value ex the Act" doctrine. As is illustrated in the present case in practical effect, however, this method merely boils down to valuing the securities on the basis of market prices of allegedly comparable securities as of a given date. Badger arived at his "investment values" by taking a number of allegedly comparable public utility preferred stocks, and ascertained their market prices on a particular date in January, 1946, namely January 4th. Then on the basis of those market prices he computed their yield basis. Then he applied such yield basis to Engineers' preferred stock and came to the conclusion that Engineers should sell on the same yield basis as the allegedly comparable stocks, *i. e.*, 4.6% per annum. In this manner, Badger arrived at the theoretical market values of the three issues of Engineers' preferred stocks.

He did this upon the assumption that there was no Holding Company Act and that Engineers' preferred stocks could not be redeemed. Thereupon he reduced those valuations to the call prices provided in Engineers' charter. In essence, therefore, Badger's valuations rest upon the market prices of the comparable stocks on a particular date in January, 1946. Although the Commission adopted this method of valuation in the Engineers case, it condemned the use of market values as determinative of equitable equivalents in the later case of Washington Railway and Electric Company (decided in May, 1947), H. C. A. R. ~~[illegible], in which~~ it stated:

"However, we have never considered market values as determinative of the fairness of a Section 11(e) plan and it is therefore unnecessary for us to make an estimate of the market value either of the pres-

[1] See C. C. A. opinion, R. 38.

ently outstanding preferred stock apart from the possibility of liquidation or of the package of securities which the preferred stock is to receive under the proposed plan."

The learned District Judge refused to adopt the Commission's valuation technique saying:

> "I do not consider the argument advanced as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality for there is a Public Utility Holding Company Act. Unless one subscribes completely to the doctrine of foreordination, things might always be different from what they are" (R. 292a).

This novel "investment value ex the Act" theory of the Commission, which in fact does nothing more than employ the market value of comparable preferred stocks at a particular time, not only finds no support in the *Otis* case but is in fact repugnant to the reasoning and basis of the *Otis* case. In that case, in addition to considering and weighing the many factors in the case, the Commission and the courts projected the earnings of the company on a long-term basis to determine the respective rights of the preferred and common stockholders. But in the *Engineers'* case, the Commission not only failed to ascertain the future earning power of the system and apportion earning power between preferred and common, but also measured the rights solely of the preferred without any adequate consideration of the rights of the common.

This failure was so obvious as to cause Judge Biggs, who also wrote the Circuit Court opinion in the *Otis* case, to state in the instant case:

> "But we think it is clear that it (Commission) did not give any substantial consideration to the future

earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation. See *Consolidated Rock Products Co.* v. *Dubois*, 312 U. S. 510, 526, and *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 565-6. In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in *The United Light & Power Company* case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so. What the Commission has done is to consider the investment values of the preferred *ex* the Public Utility Holding Company Act, *i. e.*, as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard'' (R. Vol. 6, p. 35).

The tortuous nature of the Commission's reasoning and the difficulty it has in attempting to justify its compliance with the standards laid down in the *Otis* case are apparent in its argument that it was not necessary in the *Otis* case to measure the rights of the common as well as the preferred. Thus, in its brief on page 45, footnote 30, it says:

> "It was a drawback, although we believe an unavoidable one, of the valuation technique employed in the *Otis* case that it did require the Commission to appraise the relative treatment of the United Light and Power Company preferred and common stockholders in the light of the forecast of future earnings. * * * The majority of the Commission and of this Court, however, concluded that the difficulties of the valuation process did not warrant denial of participation to a common stock which, as a matter of judgment had a legitimate investment value. See 323 U. S. 632."

It is difficult to determine from this comment by the Commission whether it is blaming itself or the courts for the valuation technique employed in that case. In fact, however, in the *Otis* case the appraisal of the rights of the preferred and common stockholders in the light of the forecast of future earnings, among other factors, was made by the *Commission* initially and approved by all the courts including this Court. And the Court of Appeals which decided the *Otis* case reminded the Commission of this when it said:

> "In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in the *United Light and Power Company* case" (R. Vol. 6, p. 35).

That the current market value is not the sole test and that future earning capacity must be carefully weighed was indicated by this Court in *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510, 526:

> "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance."

Had the Commission applied the rationale of the *Otis* case, it would of necessity have paid the preferred stockholders *less* than $100 per share. In the *Otis* case, the substantial arrearages of dividends and the limited earnings were substantial factors which induced the Commission to

discount the participation of the common stock. But in the *Engineers'* case, there were no arrearages of dividends and the common stockholders were entitled to an immediate participation in earnings above preferred dividend requirements. But instead of applying the rationale of the *Otis* case, the Commission applied solely the new test of "investment value ex the Act" or current market value exclusively for the preferreds, and reasoned that the common stockholders were the residual claimants and therefore entitled only to what was left.

The Court of Appeals called attention to that fact, saying:

> "In the instant case the Commission made no attempt to ascertain the future earning power of the system nor to apportion earning power between the preferreds and common based on their respective claims to income as it did in *The United Light & Power Company* case. But if values for the securities are to be determined *ex* the Act it is clear that the Commission should have done so. What the Commission has done is to consider the investment values of the preferred ex the Public Utility Holding Company Act, *i. e.*, as if the Act had never been passed. But it considered only the preferreds on this basis. It seems to have omitted consideration of the common by a similar standard. It made no findings as to the 'value' of the common stock" (R., Vol. VI, p. 35).

It is perfectly plain that when the Commission valued the preferred stock "ex the Act" and then gave to the common stock merely what remained of Engineers' assets that the Commission had adopted a double standard of valuation. So far as the preferred stock was concerned it valued the same as though the enterprise were continuing. So far as the common was concerned, however, it only gave to that stock what remained after Engineers had been compelled to dispose of various of it subsidiaries at great

loss and had suffered all the other deprivations incident to the liquidation of the system properties, all of which were caused by the fact that it had been commanded by the Holding Company Act to liquidate and dissolve. As the Court of Appeals well said:

> "The fact is that the holding company enterprise is at an end, both for preferreds and common. The Commission apparently has disregarded this fact which supplies the substantial difference between the instant case and The United Light & Power Company reorganizations. In the latter case the security holder participation in the enterprise was shifted from the top holding company to a subsidiary holding company but the holding company enterprise as such continued. In the instant case the Commission ascribed 'investment value' to the preferreds but failed to make a similar approach to the common. The result is that the Commission has attempted to value the securities of Engineers both ex the Act and intra the Act" (R., Vol. VI, p. 36).

POINT V

The liquidation of Engineers provided for in the Plan is not voluntary.

The entire record of the proceedings of Engineers before the Commission establishes beyond doubt that the sale of the holdings of Engineers and the liquidation of the preferred stock is the direct result of the compulsion of the Act, and the liquidation is therefore not voluntary.

Prior to the decision by the District Court, pursuant to orders of the Commission, Engineers had disposed of all of its holdings ordered to be divested except those in Gulf States, El Paso and Virginia, and with respect to the latter two companies, it had disposed of their trans-

portation properties. Subsequent to the decision it distributed to its common stockholders all the stocks owned by it in the three subsidiaries, except a small amount of stock in Virginia, which is being held in trust pending final liquidation. That the dissolution of Engineers was the result of the impact of the Act and obviously not "voluntary" is inherent in the Finding by the SEC that the proposal to dissolve Engineers is "necessary" to effectuate the provisions of Section 11(b) of the Act. The SEC in its Findings and Opinion of December 5, 1946, said (R. 47a):

> "Engineers has produced an abundance of evidence showing that once it has disposed of El Paso and Gulf, it will have no reason to continue as a separate corporate entity for it would then be the parent of a single operating company, Virginia. In that situation, Engineers admits that it would be an 'economic monstrosity' and all participants in this proceeding seem to be in agreement with that conclusion. The record does not clearly indicate what it will cost to maintain Engineers after Gulf States and El Paso have been divested. Estimates range from \$172,000 to \$365,000 a year. The company freely admits that Engineers could in no way justify any such continuing expenditure. Virginia is able to undertake its own financing and service and is large enough to stand independently.
>
> Any functions Engineers might perform should more properly be carried out by Virginia's own management. *We find that the presence of Engineers would unduly complicate the structure of the system and that it would therefore come within the prohibition of Section 11(b)(2). Accordingly we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act.*" (Italics added.)

And in its Summary of Conclusions, the Commission at R. 84a stated:

> "1. We have found those provisions of the plan providing for the disposition of Gulf States and El Paso and for the dissolution of Engineers to be necessary under the requirements of the Act."

Although Commissioner Caffrey concurred in the Supplemental Findings and Opinion of January 8, 1947 on the authority of the *Otis* case, the following portion of his concurring opinion is particularly significant (Holding Company Act Release No. 7119, p. 9):

> "Our orders under Section 11(b)(1) do not preclude a careful investigation of the surviving holding company system under Section 11(b)(2) to determine what action might be necessary (including dissolution of the top company) in order to simplify the system and distribute its voting power equitably. I think that Engineers would have been subject to such a proceeding had it not come forth with a voluntary plan. Engineers' voluntary proposal did no more than forestall the necessity for action by the Commission.
>
> Further, Engineers' decision to liquidate came as a logical step following the necessity to comply with our Section 11(b)(1) orders. It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation.
>
> Under these circumstances, I do not believe that the liquidation can properly be termed voluntary."

This point was conceded by counsel to the Commission in the hearings before the District Court on February 17, 1947 when he said (R. 196a):

> "The Commission did not dispute that Section 11 impelled the discontinuance and elimination of Engineers as a corporate entity and that the proposed dissolution is involuntary in that sense; * * *"

POINT VI

Payment to the Preferred Stockholders of an amount in excess of $100 per share plus accrued dividends contravenes the charter provisions and impairs the obligation of contract.

The applicable section of the corporate charter of Engineers provides:

> "III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock * * *."

Such a provision for the payment of a fixed amount to the preferred stockholders in the event of dissolution constitutes a contract among the stockholders, which is entitled to constitutional protection.[1]

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[1] As was said by Mr. Chief Justice Stone in the dissenting opinion in *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624, at page 645; 65 Sup. Ct. 483, at page 493:

"Such provisions for priority in a corporate charter constitute a contract among the stockholders, which is entitled to constitutional protection. Bedford v. Eastern Building & Loan Ass'n, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834; Hopkins Federal Savings & Loan Ass'n. v. Cleary, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251, 100 A.L.R. 1403; Treigle v. Acme Homestead Ass'n, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284, impairment of which is not lightly to be attributed to Congress. No constitutional issue is raised here, but we find no provision of the statute which purports to confer on the Commission, in the exercise of its power to liquidate a corporation, any authority to set aside a lawful stipulation in which the stockholders have joined fixing their relative rights in the event of liquidation."

Bedford v. *Eastern Building & Loan Association*, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834;
Hopkins Federal Savings & Loan Association v. *Cleary*, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251, 100 A. L. R. 1403;
Treigle v. *Acme Homestead Association*, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575.

The majority opinion in the *Otis* case held that the charter provisions were inoperative in "*simplification*" under Section ~~11(b)(2)~~ and that "the provision having been adopted in 1929, six years prior to the enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's Charter provision" (p. 637, *supra*).

While there may be merit to this point in its application to the facts in the *Otis* case, we have shown that under no circumstances can it be applicable to the facts in the *Engineers'* case where the charter provides that the preferred stockholders should receive a premium *only* if the liquidation was *voluntary* and where the liquidation constituted an actual dissolution of the enterprise. In this connection, the language of the minority opinion in the *Otis* case is particularly appropriate (p. 645, *supra*):

> "* * * we find no provision of the statute which purports to confer on the Commission, in the exercise of its power to liquidate a corporation, any authority to set aside a lawful stipulation in which the stockholders have joined fixing their relative rights in the event of liquidation."

And at page 647:

> "We can find no basis for saying that it is not fair and equitable, both in a technical as well as a general and non-technical sense, to require the stockholders to abide by their agreement in the very circumstances to which it was intended to apply, and where, as we

have said, there is no contention that the contract when made was or is now oppressive, unfair, inequitable or illegal."

The charter constitutes the contract between the corporation and its stockholders. It is wholly unambiguous. It covers every conceivable situation under which the corporation may be liquidated, dissolved or wound up, or its capital stock reduced, resulting in a distribution of assets to its stockholders. It provides that in that event the preferred stock shall receive $100 per share and that in case such "liquidation, dissolution or winding up or reduction shall have been voluntary" the fixed redemption premium shall be paid. We cannot imagine language more plain and unambiguous. There are no qualifications of any kind. The provision applies to any and every situation as a result of which the corporation might be liquidated or dissolved, or its capital stock reduced resulting in distribution of assets.

As we have already said, dissolution of large public utility holding company systems had already been advocated at the time of the adoption of the charter. It may therefore be fairly said that it was within the contemplation of the parties that the company might be dissolved pursuant to some statute to be passed in the future.[1] But whether the

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[1] See Senate Resolution 329, 68th Cong., 2d Sess.; see, also, recitals in Section 1(b) of the Act.

Cf. Bonbright & Means, The Holding Company, at page 49: where reference is made to the danger to holding companies generally and particularly to public utility holding companies of possible dissolution through anti-trust proceedings.

Senate Res. 83, 70th Cong., 1st Sess. (approved Feb. 15, 1928), directing the Federal Trade Commission to make an investigation and to report to the Senate with respect to "(1) the growth of the capital assets and capital liabilities of public utility corporations doing an interstate or international business * * *"

See: Summary Report of Federal Trade Commission to the Senate on "utility corporations", Vol. 72-A, p. 5 (Senate Doc. 92, pt. 72A, 70th Cong., 1st Sess.).

The Court is also respectfully referred to Appendix C of the Central Illinois Securities Corporation's brief in this Court, where at pages 168 through 175 Mr. Berman has collated excerpts from the New York Times during the years 1924 and 1925.

possible dissolution of this corporation pursuant to an edict of Congress was foreseen at that time or not is really of no consequence. The important point is that the charter covered any and every liquidation or dissolution of the corporation whether it was by force of law, through bankruptcy or by voluntary action of the stockholders. It is an all inclusive provision and if contracts have any force and meaning it must be applied to the dissolution of Engineers pursuant to an Act of Congress. We respectfully contend that irrespective of any other considerations heretofore discussed that this charter provision must be upheld as valid and enforcible and that it is decisive of the appeal in this case.

POINT VII

There is no necessity for remand. The legal effect of the action of the lower courts was to approve the alternative provision of the plan as to which action the Securities and Exchange Commission had given advance approval on a condition which will be fulfilled if this Court affirms the District Court.

The legal effect of the proceedings up to this point is that the Commission submitted to the District Court for approval a plan which had alternative provisions. A payment of $100 plus premiums for each share of preferred stock was approved as "fair and equitable", by the Commission; or, in the alternative, a plan paying only $100 per share to the preferred was approved as fair and equitable provided the District Court found it to be so, and thereafter there was no reversal of the findings of the District Court.

Under date of October 15, 1945, the Commission issued its notice of filing of plan under Section 11(e), together with its order for a hearing (R. 13a). The plan was divided into three parts. Part II requested the Commission to issue a separate order finding it fair and equitable that no

amount in addition to $100 per share be paid to the preferred (R. 18a). The purpose of splitting the plan into parts was to give the Commission an opportunity to pass separately on the amount to be paid to the preferred stock.

On December 4, 1946, the Commission in its findings and opinion (R. 25a) found that the plan was "necessary" (R. 26a), but that its proposal to pay only $100 per share was unfair to the preferred (R. 26a). The Commission decided that the equivalent of the call prices of $105 for the $5 preferred and $110 for the other preferred issues would be fair and equitable (R. 62a), that the call prices placed a "ceiling" on the amounts the preferred could receive (R. 67a). The Commission refused to grant the motion (R. 1203a), which the company had made to split the plan, but stated it would approve an amendment to provide an escrow arrangement as to any amount in excess of $100 per share in the event the Commission's findings were litigated (R. 75a, 76a). Part I of the plan was conditioned upon court approval and Part II of the plan was conditioned upon Part I being consummated (R. 45a).

The Commission pointed out that in the past it had approved plans where immediate payment was made of the amount conceded to be due and the question of additional amounts payable was reserved for future litigation (R. 74a). Provision was made for an escrow agreement (R. 75a, 76a). *In its summary of conclusions, the Commission said that the objective of the motion for separate orders on the two parts of the plan could be achieved by the creation of an escrow* (R. 85a). No order was entered and Engineers was given thirty days within which to file an amended plan.

Within the time allowed Engineers filed a new plan which proposed to retire the preferred at their respective call prices (R. 102a-116a). The plan had a proposal for an escrow provision in accordance with the Commission's order (R. 107a). The Commission thereupon issued a new

notice of filing of amendment and order and hearing (R. 117a). At the hearing two groups of common stockholders, of which we were one, objected to the payment to the preferred of more than $100 per share.

On January 8, 1947, the Commission issued its supplemental findings and opinion and order (R. 128a-R. 141a). The plan was approved as amended and the device of providing an escrow arrangement was found to be fair and equitable (135a). The Commission filed an application (R. 4a) on January 9, 1947 with the District Court seeking to enforce the amended plan. We filed our objections (R. 155a-157a).

On February 7, 1947 the President of Engineers wrote a letter to the Commission (R. 394a-395a) enclosing a proposed order of amendment (R. 395a-401a) containing a proposed escrow agreement (R. 402a-413a) in which he requested that the Commission amend its order of January 8, 1947 (R. 141a) so as to specify "the transactions which will take place if such escrow is established" (R. 395a) so as to bring the amended plan and the proceedings thereunder within the protection afforded by Supplement R and Section 1808(f) of the Internal Revenue Code. The tax law required that such steps be set forth in an order of the Commission which had become final in accordance with law if the protection were to be availed of.

The Commission on February 11th entered the requested order of amendment (R. 165a-174a) which, among other provisions, *approved in advance* the amendment of the plan so that it could be split and consummated by an alternative method through the use of an escrow (R. 168a-171a). It was provided that sufficient moneys be deposited in a bank pursuant to the provisions of an escrow agreement which would provide, among other things, that if the District Court approved the payment of the call prices and all remedies on appeal were exhausted, the call prices should be paid (R. 173a); or, in the alternative, if the District

Court approved the payment of some part of the escrow but less than the call prices and all rights of appeal were exhausted, then the amount specified by the District Court would be paid to the preferred stock (R. 174a), and the balance returned to the Company.

At the hearing before the District Court on February 17, 1947, the Commission made a motion (R. 162a-164a) to amend its application accordingly. The motion was granted (R. 163a).

At this point the Commission had submitted the plan to the District Court for approval in alternate form.

Engineers stated that in view of the likelihood of appeal by common stockholders, it wished to follow the alternative method (R. 278a). Engineers submitted a form of escrow agreement (R. 408a-413a).

On February 17, 1947, the District Court filed an opinion (R. 283a-292a) deciding that the payment of more than $100 per share to the preferred stock was not fair and equitable and approving the rest of the plan "including the escrow agreement" (R. 292a). In support of its opinion on May 29, 1949, the Court filed its findings of fact and conclusions of law (R. 293a-317a) and said in finding of fact 16 (R. 299a):

> "The Commission gave its advance approval to any arrangement that might be made in the District Court to establish an escrow fund for the premium payments and to permit the main body of the plan to be consummated pending final litigation of the premium question."

At the same time, the Court entered an order approving and enforcing the plan with the alternative provision as approved by it (R. 318a-330a). Annexed to the order as Exhibit 1 was the proposed escrow agreement with the Chase National Bank (R. 324a-330a).

The escrow agreement annexed to the order of the Court after providing for the deposit of sufficient funds to comply with the approved plan in its alternative form went on to describe the conditions under which the deposited funds might be released. Under paragraph 4 (R. 328a), upon delivery to the Chase Bank of an opinion of independent counsel (together with appropriate certified copies of appropriate orders), to the effect that the Commission or any Court having jurisdiction has issued an order, which is no longer subject to appeal, to the effect that the preferred stock is not entitled to more than $100, plus accrued dividends, the Chase Bank is directed to release and pay over to Engineers the sums of money deposited with it under subdivisions (a) and (b) (R. 324a) which were the principal amounts of the premiums, plus interest as provided in the order.

In accordance with this order, the plan has been carried into effect except for the distribution of this fund so deposited in escrow (R. 39-40).

On the appeal of the Commission and the preferred stock holders, the Circuit Court affirmed the District Court in its finding that the alternative plan to pay more than $100 per share to the preferred stock was unfair and inequitable, but reversed the District Court in its adoption of the other alternative of paying only $100 per share to the preferred and directed the return of the proceedings to the Commission for appropriate action.

A review of the above recital of facts together with an examination of the record, reveal beyond dispute that the Commission by its order of amendment dated February 11, 1947 (R. 165a-174a) by its motion of February 17, 1947 (R. 162a-164a) which was granted (R. 163a) in both legal effect and in actual fact sought the enforcement by the District Court of a plan with alternative provisions which the Commission *approved in advance.*

When and if this Court finally decides that the payment of the call price or in the alternative the payment of $100 per share to the preferred is fair and equitable, the function of the Commission will have been completely and properly performed.

The Commission approved one alternative without qualification, namely, the payment of the call price, and it approved the other alternative, namely, the payment of any sum between a minimum of $100 and a maximum of the call price upon a condition subsequent. The condition was the entry of a final order of the Court having jurisdiction and no longer subject to appeal to the effect that it was fair and equitable to pay a designated amount to the preferred. The Commission has said that it has engaged in similar procedure before (R. 74a) and in the interest of not shuttling a plan back and forth between the Courts to the Commission, it is sensible administrative practice.

The Commission having already approved the plan in the alternative, there is therefore no need for remand to the Commission for further proceedings. A direction to the Commission that it enter an appropriate order would suffice.

The District Court did not amend the plan. The only question before the District Court was whether the preferred stockholders were entitled to the redemption premium provided by the Engineer's charter to be paid in the event of a voluntary redemption or liquidation. The rest of the plan was not in dispute, and has already been carried out. The amount of this premium, plus expenses, was deposited in Court subject to the determination of that question. The District Court found that it would be unfair and inequitable to pay such redemption premium.

And in oral argument before the District Court in answer to the statement by Mr. Tucker, counsel for Engi-

neers, that if the District Court did not approve the plan in its entirety, it should go back to the Commission, Mr. Slater, counsel for the Commission, stated (R. 281a):

> "If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr. Tucker. As we view this escrow, it is a two way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted portions of a plan. * * * It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine one-hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here."

That the Commission has consistently maintained this position is apparent from its petition for rehearing in the Circuit Court where the Commission stated (R. 44, note 1):

> "* * * the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable."

The District Court had before it alternative provisions of a plan to approve. It approved one of the alternative provisions.

POINT VIII

There is no merit to the contention of *Streeter, et al.* concerning the Escrow Agreement.

Petitioners Streeter, et al.; contend that the escrow is unfair to the preferred stockholders in that it provided for the termination of dividends after the payment of $100 per share, and further that the escrow agreement was effectuated without notice and an opportunity to be heard.

These same contentions were advanced by these petitioners, in an application for a stay, to the District Court, the Circuit Court of Appeals and to Mr. Justice Burton of this Court, and in all cases, the applications for a stay were denied.

The contention that the preferred stockholders are entitled to their full dividend rate until a final determination as to whether or not they are entitled to the call premium is wholly without merit and would violate the "fair and equitable" standard of Section 11(e). The preferred stockholders have been paid $100 per share plus dividends to date of payment and have an interest in the escrowed premium fund with interest thereon at the rate of 4.75 per cent for the $5 preferred, 5 per cent for the $5.50 preferred and 5.45 per cent for the $6 preferred.

If this Court affirms the District Court, the escrowed fund will pass to the common stockholders; and the preferred stockholders will have been fully compensated by their receipt of $100 per share plus accrued dividends. If, on the other hand, this Court should reverse the District Court and the Court of Appeals and hold that the preferred stockholders are entitled to the premium, the preferred stockholders will receive the premium with interest calculated at a rate equivalent to the dividend yield upon the investment value of each series of preferred stock.

The contention of appellants, Streeter, et al. that they have not been afforded an opportunity to be heard on the adequacy of the Escrow Agreement is wholly without merit. Suffice it to say that all parties had a full opportunity to be heard concerning the adequacy of the Escrow Agreement at the hearing before the District Judge on February 17, 1947 and again on May 26, 1947.

It is significant that not only do the other appellants fail to advance these contentions, but in fact the Commission has strongly opposed them. Furthermore, these contentions were advanced by appellants, Streeter, et al., in an application for a stay of consummation of the plan. The application was denied by the District Court, by the Court of Appeals from the bench and by Mr. Justice Burton of this Court at the conclusion of the oral argument.

CONCLUSION

The decision of the District Court should be affirmed, and such part of the decision of the Court of Appeals as directs a remand to the Commission should be reversed.

Respectfully submitted,

Louis Boehm,
Attorney for Lucille White and Frances Boehm, Common Stockholders.

Louis Boehm,
Raymond L. Wise,
William Esbitt,
of Counsel.

Appendix A

Pertinent provisions of the Public Utility Holding Company Act of 1935

SIMPLIFICATION OF HOLDING COMPANY SYSTEMS.

Sec. 11(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1948:

(1) To require by order after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system; PROVIDED, *however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each regis-

tered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it

deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have the power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and op-

portunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under

this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expense, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

* * * * * * *

Court Review of Orders

Sec. 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the

order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the Court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such Court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Appendix B

Excerpts from the Certificate of Incorporation of Engineers Public Service Company

The Certificate of Incorporation of Engineers provided in pertinent part as follows:[1]

"III. *Preference on Liquidation etc.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of the assets shall be made to the holders of the common stock; but the holders of the preferred stock shall be entitled to no further participation in such distribution. * * *"

"IV. *Redemption and Repurchase.*[2] The Corporation may, at its option, at any time or from time to time redeem the whole or any part of the preferred stock or of any series thereof, at a price for each share thereof equal to $100, plus the fixed redemption premium therefor, if any, together with the amount of any dividends accrued or in arrears thereof. * * *"[3]

* * * * * *

[1] Engineers' Ex. No. 33, R. 1412a.

[2] Engineers' Ex. No. 33, R. 1413a.

[3] By resolutions of the Board of Directors, the fixed redemption premium of the $5 series was fixed at $10 per share for shares redeemed on or before June 30, 1938, and $5 per share for shares redeemed thereafter (R. 1428a). The fixed redemption premiums of the $5.50 and $6 series was fixed at $10 per share (R. 1430a-1431a).

Appendix B

"This Corporation may also from time to time re-purchase shares of its preferred stock at not exceeding the price or prices at which the same may be redeemed. * * *"

* * * * * *

"Division B—The Common Stock[1]

II. *Distribution of Assets.* In the event of any liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, after there shall have been paid to or set aside for the holders of the preferred stock the full preferential amounts to which they are respectively entitled under the provisions of Paragraph III of Division A of this Article Fourth, the holders of the common stock shall be entitled to receive, *pro rata*, all of the remaining assets of this Corporation available for distribution to its stockholders."

[1] Engineers' Ex. 33, R. 1417a.